

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 04-11854-MWV
Chapter 7

Robin T. Bly,

Debtor

Mariann Hosely,

Plaintiff

v.

Adv. No. 04-1211-MWV

Robin T. Bly,

Defendant

Carl D. Hanson, Esq.

THE LAW OFFICES OF WILLIAM HOWARD DUNN

Attorney for the Plaintiff

Lanea A. Witkus, Esq.

WITKUS, WILSON & WEIDMAN, P.C.

Attorney for the Defendant

MEMORANDUM OPINION

The Court has before it the complaint of Mariann Hosely (the “Plaintiff”) against Robin T. Bly (hereinafter “Debtor” or “Defendant”) seeking that certain obligations owed to her be excepted from discharge pursuant to section 523(a)(15) of the Bankruptcy Code.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

The parties were divorced in 1997. Paragraph 18 of the permanent stipulation provided that “the real estate situated at Bowker Street, Claremont, New Hampshire is awarded to the Plaintiff [Robin Bly], free and clear of any claims of the Defendant thereon, and subject to any outstanding mortgages or liens, which the Plaintiff shall be solely responsible for the payment of.” (Def.’s Ex. 1.) In accordance with that provision, the Plaintiff herein quitclaimed her interest in the property to the Defendant herein.

The Defendant was unable to maintain the mortgage payments, and on February 11, 1999, a foreclosure sale was held by the mortgagee, which evidently resulted in a deficiency of approximately \$17,000. The Defendant had previously filed bankruptcy, and that deficiency obligation was discharged as to him. Subsequently, a collection agency pursued the Plaintiff who, not wanting to have her current residence attached, satisfied the obligation by charging \$13,000 to her credit card. By an order dated March 5, 2004, the Sullivan County Superior Court ordered:

The respondent’s request for reimbursement of the money she paid to settle the mortgagee’s claim is granted, as follows. Beginning thirty (30) days after the date of the Clerk’s Notice of this Order, the petitioner shall pay the respondent \$13,000, plus interest at the rate of the respondent’s credit card (or the rate of any credit card to which the respondent or petitioner may transfer the obligation), at the rate of \$300 a month. If the petitioner is able to transfer the balance of the respondent’s credit card to a credit card in his own name, the respondent shall cooperate, and the petitioner shall be relieved of any obligation to pay interest accruing after the date of the transfer.

(Def.’s Ex. 2.)

On May 20, 2004, the Defendant filed this current bankruptcy. On August 9, 2004, the Plaintiff filed the complaint, which is the subject of this order. On February 16, 2005, the Court held a half-day trial and took testimony and evidence from both the Plaintiff and the Defendant.

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

. . . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C.A. § 523(a)(15) (West 2004). There is no doubt that the obligation in question was incurred in connection with a divorce decree.

The first question before the Court is whether the Defendant can pay the obligation. The Court is not convinced that he cannot pay the obligation. The Debtor's pay stub for the week of February 4, 2005, indicates net pay, after deducting federal taxes and Social Security, of \$398.62, or \$1,727.35 per month. The Debtor testified at trial that he will be entitled to an IRS refund for the 2004 tax year of \$2,319. The Court adds \$200 per month to the income mentioned above, giving apparent monthly income to the Debtor of \$1,927.35.

The Defendant produced at trial an amended Schedule J indicating expenses of \$2,282. This included the motorcycle payment of \$300, however, this Court agrees with the superior court that it is unnecessary. Also, the Debtor testified that he pays one-third of the utilities, although Schedule J shows that he pays one-half. This requires an adjustment of \$52 per month, leaving apparent expenses, after deducting the \$300 and \$52, of \$1,930 per month, which amount is essentially the same as his income.

Two reasons dictate why the Court is not convinced that the Debtor cannot pay the obligation. First, the Debtor appears to have a good job, with his income most probably increasing over the years. Plaintiff's Exhibit 9 showed adjusted net income for tax year 2003 of approximately \$21,300. The Debtor testified that this adjusted net income had increased to \$27,000 for the 2004 tax year, although his

2004 return, which had been filed, was not submitted into evidence. Second, the Debtor has just been ordered to pay child support to the State of New York for a recently born child in the amount of \$468 per month. (Def.'s Ex. 101.) This determination was made by default and, in any case, is included in the expenses listed above. The Court believes that the Debtor has the ability to pay the obligation to the Plaintiff herein.

This Court also finds that the benefit of a discharge to the Debtor does not outweigh the detriment to the Plaintiff. The Debtor, pursuant to the parties' divorce decree, was awarded the marital homestead and was obligated to pay all of the obligations related thereto. He did not do that, resulting in a deficiency, which he discharged in a previous bankruptcy and which the Plaintiff, however, had to pay through the use of a credit card. In weighing the equities of the case, it is not whether the Plaintiff can afford to pay the obligation, but that it was the Debtor's obligation to pay, which he failed to do, creating a burden on the Plaintiff that should not have occurred. For the reasons set out herein, the Plaintiff's complaint seeking an exception to discharge pursuant to section 523(a)(15) of the Bankruptcy Code is granted.

CONCLUSION

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 24th day of February, 2005, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge